to a stop when the impact took place. I did neither accept defendant's version that there were no cars parked on his right hand side of the road near the scene of the collision nor his version that the plaintiff was looking to his left at the roof tops of some factories just before the collision. I also did not accept that the defendant had sounded his horn. I found that both the plaintiff and the defendant had not kept proper lookouts and they were both to blame for this accident. As the plaintiff had to encroach on the wrong half of his road slightly to pass the line of parked cars on his left there was need for him in the circumstances to exercise an even better lookout than under normal circumstances and see that the road ahead was safe. If the plaintiff had done so he would have seen the defendant's car almost near the centre of the road ahead of him earlier than he did and he would have had sufficient time to warn the defendant of his approach. This would have enabled the defendant to move further to the defendant's left edge of the road and avoid this accident. I found that the defendant when he first saw the plaintiff was travelling in his car about 5 feet at least from his left edge of the road. The defendant too if he had kept a proper look would have seen the plaintiff earlier than what he did.

In the circumstances I found the plaintiff two-thirds and the defendant one-third to blame for this accident.

The plaintiff as a result of this accident sustained the following injuries: —

1. Closed fracture midshaft of right femur.
2. Avulsion of right posterior cruciate ligament with haemarthrosis of the knee-joint.
3. Fracture lower pole of right patella.
4. 2½ cm. laceration front of right knee.

He was treated for these injuries as an inpatient from February 24 to March 23, 1973 at the Outram Road General Hospital. Thereafter he was followed up as an outpatient. By June 7, 1973 the plaintiff was able to go back to light duties.

He has some loss of knee flexion which prevents him from squatting fully. He had an intramedullary nail introduced into the femur to fix the fracture and this will have to be removed by a further operation in due course.

Having considered the 2 medical reports at AB6 and AB7-8 and the opinions expressed therein which were not in dispute and which I accepted, and having regard to the awards made in comparable cases, I assessed the General Damages for all these injuries at $8,000. The Special Damages were agreed at $600.

In the result there was judgment for the plaintiff in the sum of a third of $8,600 with the usual consequential orders.

Order accordingly.

Solicitors: *Ng Kian Fong & Co.; Ong & Chellam.*

MALAYSIAN REPORTS

MAHMOD BIN KAILAN v. GOH SENG CHOON & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) August 20, 1976]
[Johore Bahru — Federal Court Civil Appeal No. 28 of 1976]

Tort — Negligence — Damages — Damages for loss of past earnings and loss of prospective earnings — When appellate court will interfere with assessment of damages.

Evidence — Letter from company stating that person is a labour contractor — Whether letter can be admitted without calling anyone from the company — Evidence Act, 1950, s. 73A.

The appellant appealed against the award of damages for loss of earnings, which had been awarded to him when he obtained judgment against the driver and owner of a taxi which had knocked him down. It was alleged that the learned trial judge had not given an award for past earnings. The learned trial judge awarded $12,000 for loss of earning capacity. The appellant had sought to prove that he was a labour contractor by producing a letter from a construction company, but no one from the company was called to give evidence.

Held, allowing the appeal: (1) the appellate court can only interfere with the award of damages by the trial court if it is shown that the trial judge has acted on a wrong principle of law or that he has misapprehended the facts or he has made a wholly erroneous estimate of the damage suffered;

(2) in this case the learned trial judge would have been justified in holding that the appellant but for the accident could have earned $200 a month as a labourer and therefore he should have awarded $14,800 for loss of past earnings for 74 months and $13,000 as general damages for loss of prospective earnings;

(3) the learned trial judge was correct in refusing to admit the letter from the company as not all reasonable efforts had been made to find the author of the letter.

Case referred to:-

(1) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, 616, 617.

FEDERAL COURT.

David Tay for the appellant.

V.P. Nathan for the respondents.

Suffian L.P.: The plaintiff, a motor cyclist, was injured when a taxi knocked him down and won judgment against the taxi driver and against the taxi owner.

He was awarded damages for three items as follows:

(1) $1,474 special damages;
(2) $35,000 for pain and suffering and for loss of amenities; and
(3) $12,000 for loss of earning capacity.

In this appeal, Mr. Tay argues on his behalf that the quantum should be more. He does not criticize items (1) and (2), but only item (3).

Loss of earnings is of two kinds:

(1) loss of past earnings; and
(2) loss of future earnings or loss of prospective earnings.

Mr. Tay says that what the learned trial judge has done is to make an award for loss of future earnings, but nothing at all for loss of past earnings. It is urged on us that the learned judge should have awarded —

(a) for loss of past earnings $33,500 if the plaintiff had been making about $450 p.m. or $14,800 if $200 to $300 p.m.; and

(b) about $22,500 for loss of future earnings.

The principle upon which we can interfere with the award has been stated by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*[1] as follows:

"Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint* v. *Lovell*. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

The questions here therefore are — has the learned trial judge acted on a wrong principle of law or has he misapprehended the facts or has he made a wholly erroneous estimate of the damage suffered?

At the outset I should say at once that I do not agree that he has awarded nothing for loss of past earnings. He said in his written judgment —

"the plaintiff had failed to prove the amount of his loss in respect of past or future earnings and taking into consideration all the circumstances of this case I was of the view that a sum total of $12,000 by way of loss of *earnings* and earning capacity would be fair and reasonable."

In my view it is clear that the word underlined was used by the learned judge to mean past earnings in contrast to the next three following words which meant loss of future earnings.

So the next question that arises is: has the learned judge misapprehended the facts when he awarded only $12,000 for these two items?

Mr. Tay says yes. The plaintiff was a labour subcontractor, *i.e.* he found labour for a contractor, and he produced a letter written on August 17, 1973, by Heng Lee Construction Co. to his solicitor saying that he was the company's labour subcontractor and that his average monthly income as labour subcontractor was about $450 during the previous 6 to 12 months. At the trial Mr. Tay tried to have this letter admitted in evidence under section 73A(1) of the Evidence Act, *i.e.* without calling anybody from the company to give evidence. Mr. Tay called as witness a clerk of the plaintiff's solicitor who said that he went to the company's premises on July 11, 1975, but found its sign-board missing and was told by some people on the first floor that the company had shifted but nobody knew where to and that he could not find the company's address in the phone book either. The learned trial judge did not admit the letter on the ground that the witness never enquired of the Business Registration Department nor of the Registry of Companies. With respect I think that in these circumstances not all reasonable efforts have been made to find the author of the letter within the meaning of the proviso to subsection (1) of section 73A of the Evidence Act and that therefore the learned judge was right in refusing to admit the letter.

However I agree with Mr. Tay that even in the absence of the evidence contained in that letter it would be reasonable to assume that the plaintiff did nevertheless earn *some* money because at the time of the accident he had a wife and five children and he was the sole breadwinner. The plaintiff said in evidence that before he worked as a labour subcontractor for Heng Lee Construction Co. he had worked as a labourer earning about $200 to $300 a month and I think that on the evidence it would have been open for the learned judge to find that the plaintiff was earning about $250 p.m. as a labourer and that giving allowances for uncertainties in the construction industry the learned judge would have been justified in holding that the plaintiff but for the accident could have made about $200 p.m. as a labourer during the period between the date of the accident and the date of trial, and on this basis the learned judge could and in my opinion should have awarded the plaintiff $14,800 damages for loss of past earnings for that period of 74 months.

As for loss of future earnings, at the time of the trial the plaintiff was 39 and normally, barring all accidents, he could have worked until age 55, *i.e.* he had a working life expectancy of 16 years. Before the accident he was earning about $200 as a labourer, after the accident he was unemployed and earning nothing because he said when contractors saw him they would not engage him (he had his right leg amputated above the knee). However, I think that the court could reasonably suppose that he could find some way of making a living, or else how is he going to support his wife and five children? Perhaps he can still make say about $100 a month, in which case he will after the date of the trial suffer a diminution of income at the rate of say $100 p.m. or $1,200 a year, or $19,200 in 16 years. But for his injuries he would have earned this amount only by the end of 16 years. But as he will get a lump sum now he should be awarded only the present sum of $13,000 which if invested now at 6% p.a. will yield approximately $19,200 in 16 years.

In the circumstances, I am of the opinion that the damages for loss of past and future earnings assessed by the learned judge at $12,000 should be increased to $27,800 (comprising —

(a) $14,800 for loss of past earnings which being special damages should bear interest at the rate of 3% p.a. from date of accident until date of trial; and

(b) $13,000 which being general damages should bear interest at the rate of 6% p.a. from February 14, 1972, to the date of trial).

I would therefore vary the order of the trial judge accordingly.

This appeal is accordingly allowed, with costs, the appellant's deposit to be returned to him.

Lee Hun Hoe C.J. (Borneo) and **Ali F.J.** concurred.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Richard Talalla.*